1966

State of Utah v. Ray Clarence Rasmussen and Ray Clarence Rasmussen v. George Beckstead, Sheriff of Salt Lake County, Utah : Brief of Respondent

In The Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

- vs. -

RAY CLARENCE RASMUSSEN,

Appellant.

RAY CLARENCE RASMUSSEN,

- vs. -

GEORGE BECKSTEAD, Sheriff of Salt Lake County, Utah,

BRIEF OF

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In The Supreme Court of the State of Utah

STATE OF UTAH,

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- vs. -

RAY CLARENCE RASMUSSEN,

Appellant.

Case No. 10475

RAY CLARENCE RASMUSSEN,

Appellant,

- vs. -

GEORGE BECKSTEAD, Sheriff of Salt Lake County, Utah,

Respondent.

Case No. 10426

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

Ray Clarence Rasmussen was convicted of the crime of second degree burglary upon jury trial in the District Court of Salt Lake County on July 26 and 27, 1965. On July 26, 1965, the appellant filed a petition for writ of habeas corpus in the District Court of the Third Judicial District, which petition for writ of habeas corpus was denied by the Honorable Aldon J. Anderson, who sat as trial judge on the appellant's subsequent trial on the charge of

second degree burglary. From the denial of the petition for writ of habeas corpus and the conviction of the second degree burglary charge the appellant has prosecuted this appeal. Both matters were consolidated for appeal.

DISPOSITION IN THE LOWER COURT

The appellant was charged with the crime of burglary in the second degree and arraigned in the District Court of Salt Lake County on June 2, 1965. He subsequently filed a petition for writ of habeas corpus on July 21, 1965, on the grounds that he was denied a speedy trial. The petition for writ of habeas corpus was heard on the 26th day of July, 1965, and denied by the Honorable Aldon J. Anderson. Judge Anderson had theretofore on the 22nd day of July, 1965, denied a motion to dismiss for want of a speedy trial. The appellant was brought to trial on July 26, 1965, and on July 27, 1965, was convicted and committed to the Utah State Prison.

The respondent will adopt the references to the record as follows:

Habeas corpus record — HCR

Appeal record — R

RELIEF SOUGHT ON APPEAL

The respondent submits that the decision of the trial court in each instance should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts:

The appellant was arrested on April 3, 1965, and confined in the Salt Lake County Jail (HCR 1). He was arraigned in the District Court of Salt Lake County on the charge of second degree burglary on June 2, 1965. At the time of his arraignment, he was still confined in the Salt Lake County Jail and could not make bond (R 16).

His trial was set for June 15, 1965. The appellant contends that an oral demand for a speedy trial was made on June 15, 1965, which was the date originally set for trial. The case was not tried on June 15, 1965, because an automobile homicide case which was being tried was not finished (R 41). The case was thereafter set for trial on July 2, 1965. The case had been set for third place setting on June 15, 1965, and, consequently, when the automobile homicide case was not finished, was not tried (HCR 24 and R 41).

On July 2, 1965, the case was postponed because Judge Ray Van Cott, Jr., the judge assigned to hear the case, became ill and was unable to handle the matter (R 41). On July 13, 1965, the appellant filed a written motion for a speedy trial (R 8 and HCR 19). The case was apparently set for the 21st day of July, 1965, but the Salt Lake Legal Defender's Office was not ready to try the case

because of an apparent failure to receive notice (R 39).

On July 21, 1965, the same day that the prosecution had been ready to go forward with the case against the appellant, the appellant filed a petition for writ of habeas corpus, seeking release from the custody of George Beckstead, Sheriff of Salt Lake County, on the grounds that he was being denied a speedy trial (HCR 1). On July 22, 1965, a hearing was held before the Honorable Aldon J. Anderson, District Judge, on a motion of the appellant to dismiss the charges for want of a speedy trial (R 37). Judge Anderson denied the motion to dismiss based upon representations of counsel as to the relevant facts. It was stipulated by counsel for the State and the appellant that the failure to try the appellant at any of the times set was no fault of the court or the district attorney. This is acknowledged on page 4 of the appellant's brief.

Prior to the appellant's trial on the 26th day of July, 1965, the date Judge Anderson set for the trial denying the motion to dismiss on July 22, 1965, the appellant's petition for writ of habeas corpus based on denial of a speedy trial was heard. The petition for writ of habeas corpus was denied (HCR 28).

Based upon the above facts, the appellant contends that he was denied a statutory and constitutional right to a speedy trial.

ARGUMENT

POINT I.

THE APPELLANT PRESENTS NO BASIS FOR HABEAS CORPUS ON APPEAL SINCE (A) THE HABEAS CORPUS ISSUE IS MOOT, AND (B) THE NOTICE OF APPEAL DID NOT RECITE THAT IT WAS FROM A DENIAL OF THE WRIT OF HABEAS CORPUS.

A. The appellant is presently confined at the Utah State Prison. He is no longer in the custody of George Beckstead, Sheriff of Salt Lake County, or any other officer of Salt Lake County[1]. Further, the appellant has been convicted of the crime of second degree burglary, and the same issue is raised on appeal from his conviction as was raised in the petition for writ of habeas corpus. It is submitted, therefore, that the appeal from the denial of the application for writ of habeas corpus is moot and should be dismissed.

B. The notice of appeal filed by the appellant from the denial of his application for writ of habeas corpus states that the appellant appeals from "the judgment and conviction of the above entitled court which was entered on the 27th day of July, 1965, on the grounds that the decision was contrary to the evidence and that hearing in the above case was in violation of the defendant's constitutional rights in the federal and state constitutions." The notice of appeal does not recite that it is taken from the denial of the appellant's application for writ of

(1) The court may take judicial notice of the death of Sheriff Beckstead and Judge Van Cott.

habeas corpus. Habeas corpus is a civil proceeding subject to the rules of civil procedure. **Burleigh v. Turner,** 15 U.2d 118, 388 P.2d 412 (1964). Rule 73 (b) provides:

> "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall designate that the appeal is taken to the Supreme Court."

In the instant case, the notice of appeal does not designate the actual judgment appealed from. Consequently, it does not comply with the Utah Rules of Civil Procedure, and the matter of the denial of the appellant's application for writ of habeas corpus is not properly before the court. **Sierra Nevada Mill Company v. Keith O'Brien's,** 48 Utah 12, 156 Pac. 943 (1916).

POINT II.

THE APPELLANT WAS NOT DENIED A STATUTORY OR CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The appellant contends that he was denied a speedy trial provided for by Section 77-1-8(6), Utah Code Annotated, 1953. That section provides:

> "(6) To have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; and every defendant in a criminal action unable to get bail shall be entitled to a trial within thirty days after arraignment, if court is then in session in such county, otherwise the trial of such defendant shall be called on the first day of the next succeeding session of the court."

There is nothing in subsection (6) of Section 77-1-8, Utah Code Annotated, 1953, which provides that charges must be dismissed for failure to bring a defendant not admitted to bail to trial within 30 days. Generally, most statutes making a statutory provision mandatory expressly provide for dismissal. See Note, 57 Columbia L. Rev. 846. It is submitted, consequently, that the above provision is not manditory, but is directory and that an individual is not to dismissal of the charges for failure to be prosecuted within thirty days from the time of arraignment, unless the failure is, itself, tantamount to a denial of speedy trial.

Even so, it is generally recognized that the failure to comply with statutory requirements for a speedy trial does not entitle the defendant to dismissal of the charges or reversal of a conviction. if ther ewas justification for the delay.

Thus, in Wharton's Criminal Law and Procedure, Vol. 5, sec. 1912, speaking of the right to a speedy trial, it is stated:

> "This guaranty is not given a literal interpretation, and it has been held that the defendant's right is not violated by the mere fact that he is not tried at the next term of court, particularly when he consented to such delay, or raised no objection to postponement, or caused the delay by his own action, or was absent from the state. Delay is excused when the attorney for the prosecution was otherwise engaged, or when other business of the court or climatic conditions require postponement when a continuance was properly granted, or when the defendant was imprisoned for another offense."

See also Abbott Criminal Trial Practice, 4th Ed., p. 252; **People v. Bagato,** 27 Ill.2d 165, 188 N.E.2d 716 (1963); 21 Am. Jur.2d, Criminal Law, Section 246. This is, of course, a necessary corollary to the rule, since, generally, retrial is not barred by the failure to meet the requirements. Note, Dismissal of the Indictment as a Remedy for Denial of the Right to a Speedy Trial, 64 Yale L. J. 1208 (1955); Note, 57 Columbia L. Rev. 846, supra; 21 Am. Jur2d, Section 145.

In the instant case, the appellant was arraigned on June 2, 1965. If it is assumed that the provisions of Section 77-1-8(6), Utah Code Annotated, 1953, are mandatory, rather than directory, it still appears that there was sufficient justification for the delay, so that a denial of a right to a speedy trial was not involved. On June 15, 1965, well within the 30-day period, the appellant's trial was set. However, because of other court business, specifically, that another trial had not ended, the appellant's case could not be heard. The case was reset on July 2, 1965, again within the 30-day period. However, at that time, Judge Van Cott became ill and the case could not be heard (R 41).[2] Up to that time, the only evidence in the record of a demand for a speedy trial is a contention of the appellant that his counsel made such a request at the time of his arraignment on the 2nd day of June, 1965. There was nothing in the minutes of the court to support that conclusion. A formal written demand was not filed until July

(2) Judge Van Cott subsequently died, which certainly indicates that the illness was not an insignificant one.

13, 1965. cf. **State v. Bowen,** 67 Utah 362, 748 Pac. 119 (1926). Trial was again apparently set on July 21, 1965, and at that time, the appellant's counsel did not appear for the trial, although the prosecution was present and ready to proceed. Trial was had the same day as the appellant's petition for writ of habeas corpus was denied. It was stipulated between the parties at the time of trial and at the time of the hearing on the motion to dismiss the charges because of the lack of a speedy trial that the delay was in no way caused by the prosecution or the fault of the prosecution, but was a matter of circumstances.

Under these facts, it is apparent that there has been a showing of good cause for the delay and the failure to meet the statutory time period, assuming it is mandatory, rather than directory, would not justify dismissal of the charges against the appellant.

In **King v. United States,** 265 F.2d 567, (D.C. Cir. 1959), a similar situation was placed before the United States Circuit Court for the District of Columbia. The appellant King had been indicted and was convicted of the crime of assault with a dangerous weapon. On appeal, he contended that he was denied a speedy trial. The offense occurred October 27, 1956. On December 3, 1956, an indictment was returned and on December 7, 1956, King was arraigned. The case was set for trial January 14, 1957, and continued to January 28, 1957, on the defendant's motion. On January 28, February 7,

March 20, and April 15, 1957, the case was continued "for the reason, in the parlance of the courthouse, 'no court available.'" In speaking of the facts, the court observed:

> "Certain features of the foregoing sequence of events are to be noted. First of all, the prosecutor had no part in any of the delays. He never requested or occasioned a continuance. Indeed it is easy to imagine that the edge of his case might have been dulled by the repeated vain excursions to the courthouse by the eye-witnesses presented by the Government, the only witnesses (save King) in the case. King has not claimed an inaccuracy in their account. In the second place, of the seven continuances, three were on King's behalf; of the 140 days which elapsed, some 60 days of delay were requested or occasioned by King himself. In the third place, King does not allege any prejudice by reason of the delay. As we have noted, there were a number of eyewitnesses; the accounts of all, including King, tallied substantially, no one denied that King cut Smith. The only issue was whether the cutting of Smith was pure accident or the result of a furious, blind slashing about.
>
> No doubt this problem lies at a spot where the ideal clashes head-on with the practical. Ideally, maybe every accused person would be indicted or released the day he is arrested and, if indicted, however, would not be deemed ideal by those indicted persons whose interests are best served by delay, —and there are doubtless many such. In any event practicalities prevent any such Utopia — if it be Utopia. Lawyers often need time for preparation, and witnesses frequently need to be found and, when found, must have advance notice to attend. Moreover, cases have to take their turn. The case on trial is entitled to deliberate consideration; the others on the calendar stack up. At the same time, too much heed to practicalities may encroach upon the indi-

vidual's rights. If the legislature were to refuse to install sufficient judicial machinery to perform the judicial tasks, it might be necessary to turn some accused persons loose. But the present situation is far from that hypothetical crisis. The problem here is to dispose of the present number of criminal cases through use of a reasonable amount of judicial machinery. A method of disposition which reasonably accommodates practicalities is not illegal.

We think the delay here (a total of 140 days, 60 days of which was requested by defense counsel) between arraignment and trial, on account of a crowded calendar, is not such a prolonged period as to be denial of speedy trial in a constitutional sense. The fact that the dalay was in successive bits instead of by one long postponement is immaterial to the problem of constitutionality, where the off-and-on program has no harmful impact on defense witnesses . . .

In any procedural practice short of the trial, it is easy to find some element which could be called illegal. But, where a method is chosen because it meets the practical problems of a court and is clearly within the realm of the reasonable, we do not advance the cause of justice by harsh condemnation. We have neither the data nor the means with which to devise another method of putting an average of five new cases a day on the District Court's calendar. Sometimes we are compelled to declare a procedural practice void without even considering possible alternates; we do not feel so compelled here. We do suggest that the District Court give the problem continuing attention, especially in respect of defendants held in jail.

Indeed we were told at oral argument that experimental variations from the practice here involved were then already under way. We find no reversible error in this phase of the present case, despite the

> **earnest and intelligent presentation by counsel who undertook this duty at the court's behest."**

The California courts have clearly recognized that good cause justifies the failure to comply with the time periods set forth for trial under Sections 1381 and 1382 of the California Penal Code.[3] **People v. Rucker,** 121 Cal.App. 361, 8 P.2d 938.

In **State v. Squier,** 56 Nev. 386, 54 P.2d 227 (1936), the defendant claimed denial of a speedy trial. The date of the crime was May 17, 1934, and the information filed June 9, 1934. Arraignment was on June 25, 1934. July 9, 1934, was set for the date of the trial. On July 3, 1934, the court on its own motion, because of congested calendar, continued the trial until September 17, 1934. The court noted that the defendant had at this time demanded a speedy trial and accepted to the order continuing the matter until September 17, 1934. Extremely hot weather, lack of court facilities, and a congested calendar were the reasons for the continuation. The contention was made that the failure to try the defendant violated the provisions of 1194 Nevada Compiled Laws. The Nevada Supreme Court determined that there was no violation of any constitutional or statutory right. The court stated that the fact other cases arose necessitating the continuance and the lack of appropriate courtroom facilities to

(3) Research has not disclosed a statute comparable to that in Utah. Most of the time periods are substantially longer and expressly provided for dismissal, in the event of failure to go to trial during the time period. Good cause is usually deemed an excuse for failure to comply with the statutory period. Note, 57 Columbia L. Rev. 846. cf. **People v. Bagato** 27 Ill.2d 165, 188 N.E.2d 716 (1963).

accommodate a jury in hot weather were sufficient justification for the delay.

In **State v. Churchill,** 82 Ariz. 875, 313 P.2d 753 (1957), the Arizona Supreme Court was concerned with whether the failure to bring the defendant to trial within a 60-day period described by Rule 236 of the Arizona Rules of Criminal Procedure, formerly Section 1274 of the Arizona Penal Code. The Arizona court indicated that the rule provision, which expressly provided for dismissal, required the case to be dismissed "unless good cause is shown." In the Churchill case, a minute entry reflected that there were judges absent from the county which prevented the case from being tried within the 60-day period and an especially heavy work load. The court ruled that the absence of trial judges in the county justified the delay. The court said that before a defendant was entitled to dismissal under the provisions of Rule 236, he "must bring himself within the spirit and intention of the rule." The court said:

> **"The principal purpose being not to allow the guilty to escape upon technicalities, but to shield the innocent by preventing unnecessary and unreasonable delays. Good cause means substantial reason; that is, one that affords a legal excuse."**

See also **Castle v. State,** 143 N.E.2d 570 (Ind. 1957); **People v. Denuyl,** 320 Mich. 477, 31 N.W.2d 699 (1948); **State v. Werner,** 105 N.W.2d 668 (S.D. 1960).

All of the above cases support the proposition that in factual situations similar to the instant case,

the appellant cannot contend that he should be relieved from a conviction for failure to comply with a statutory request that a trial be had within a particular period of time.

In the case of **State v. Endsley,** 19 Utah 478, 57 Pac. 430 (1899), the Utah Supreme Court noted that a defendant could have his case dismissed under Section 5065 of the Revised Statutes of 1898, it was necessary for him to prove that he was entitled to dismissal. The court said:

> "Doubtless, by this statute, the legislature intended to secure to every defendant in a criminal prosecution a speedy trial, **in the absence of good cause being shown for delay.*****"

Since good cause appeared in the instant case, even though a different statute was involved, the appellant is not entitled to acquittal on the charges.

In **State v. Kuhnhausen,** 201 Ore. 478, 272 P.2d 225 (1954), the Oregon Supreme Court had before it a similar issue to that now before this court. Oregon Revised Statutes, Section 134-10, provided that a defendant who is not brought to trial at the appropriate term of court was entitled to have charges dismissed. The Oregon court ruled that there was both a statutory and a constitutional right to a speedy trial to avoid oppressive delay. The Oregon court ruled that the statutory provision was merely an enactment pursuant to the constitutional provision. The court ruled that dismissal would only lie if there was no cause sufficient to support

the delay. The court indicated that the congestion of the trial docket was a sufficient basis for the delay. The opinion is well documented with substantial authority and able reasoning.

Applying the above case law to the relevant Utah statute, it is apparent that there is no statutory basis for the release of the appellant.

The appellant's contention that he is entitled to release because of an inordinate delay resulting in the violation of his constitutional rights is equally without merit. The provisions of the Federal Constitution in Amendment VI requiring a speedy trial have not as yet been incorporated in the due process clause of the XIVth Amendment against the states. However, the Federal Constitution undoubtedly would be violated if some specific prejudice resulted from unconscionable delay. 21 Am. Jur.2d, Criminal Law, Section 241. In any event, Article I, Section 12, of the Constitution of the State of Utah guarantees that an accused shall have the right to a speedy trial.

In **State v. Mathis,** 7 U.2d 100, 319 P.2d 134 (1957) this court stated with reference to the state constitutional demand:

> " 'Speedy trial' as used in our Constitution and statutes is necessarily a somewhat flexible term. It must be interpreted and applied in accordance with the practical exigencies to be encountered in the handling of the business of the courts. Desirable as it may be to accommodate those accused of crime with expeditious procedures, which the courts are usually anxious to do, a defendant cannot demand

> the impossible, nor should he be permitted to take advantage of an adverse situation and insist that the the charge against him be dismissed because of the unexpected absence of a key witness, when it appears that the witness would be available within a reasonable time. It would be high handed and severe to refuse a continuance to either side caught in such circumstances.
>
> The law is, or at least those who devote their lives to it like to think it is, the embodiment of reason and good sense. The duty of the court in administering justice carries deeper responsibilities than presiding over a game of tricks. This would be the result of arbitrarily dismissing an action when one counsel finds himself in a position of disadvantage because of the unexpected absence of an important witness. Experience teaches that in the arranging of trials and the marshalling of witnesses, sometimes either the prosecution or the defense may inadvertently find itself unable safely to proceed to trial. While diligence in preparation should be insisted upon, the courts necessarily must be somewhat indulgent of perplexing situations which arise, to the end that both sides have a fair opportunity to present their respective cases."

The meaning of speedy trial is not a term fixed according to absolute rules and regulations, but is primarily directed to holding the defendant free from vexatious, capricious, or oppressive delays. 21 Am. Jur.2d, Criminal Law, Section 243. The mere lapse of time does not necessarily mean that a defendant has been denied a speedy trial. Generally, there must be some vexatiousness or capriciousness which interferes with the proper administration of justice. 21 Am. Jur.2d, Criminal Law, Section 251.

In **State v. Hartman,** 136 N.W.2d 543 (Minn. 1965), the Minnesota Supreme Court held that a five-month delay between the time of arrest and the time of prosecution where the defendant was unable to make bail would not, in and of itself, constitute a denial of the right to a speedy trial. The court said there was no showing of any prejudice or vexatiousness to the injury of the defendant and, therefore, no violation of his constitutional rights. Federal courts have required a substantially greater showing of unwarranted delay before finding a constitutional violation than can be claimed in the instant case. Thus, it has been stated that the right to a speedy trial "is necessarily relative. It is consistent with delays and depends upon circumstances." **Beavers v. Haubert,** 198 U.S. 77 (1905). Corbin, Constitution of the United States of America Anno. (1963), pp. 1000, 1001. Research has disclosed no case comparable to the fact situation in the instant case, where an appellate court has concluded that a defendant has been denied his constitutional rights to a speedy trial.

Recently, in **United States v. Ewell,** U.S. 34 L.W. 3154, February 23, 1966, the United States Supreme Court considered the question of whether a defendant was denied a constitutional right to a speedy trial. It appeared that the appellee had been convicted of selling narcotics under a federal statute in 1962. In 1963, Ewell filed a motion to vacate his conviction, which was granted in April of 1964. Ewell was then rearrested and new complaints is-

sued, reindicting the defendant on June 15, 1964. The government dismissed some of the charges on which Ewell had been originally convicted and prosecuted on one charge that had been known to it at the time of the original charges. The trial court dismissed the new complaint and the United States Supreme Court reversed. The court stated:

> "We cannot agree that the charge of 19 months between the original arrest and the hearings on the later indictments, itself, demonstrates a violation of the Sixth Amendment's guarantee of a speedy trial. This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompying public accommodation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in a large measure, because of the many procedural safeguards provided an accused, the orderly procedures for criminal prosecution are designed to move at a deliberate pace. The requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this court has consistently been of the view that 'the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' Beavers v. Haubert, 190 U.S. 77, 78. 'Whether the delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances. ****The delay must not be purposeful or oppressive,' Pollard v. United States, 352 U.S. 354, 361. 'The essential ingredient is orderly expedition and not mere speed.' Smith v. United States, 360 U.S. 1, 10."

Since the Sixth Amendment to the United States Constitution and Article I, Section 12, of the Constitution of the State of Utah bear substantial similarity, decisions of the United States Supreme Court should be deemed relevant to the construction of the Utah Constitution. It is apparent that the decisions from the United States Supreme Court would not support a determination of a denial of the right to a speedy trial in the instant case. Further, those decisions are comparable to the position adopted by this court in **State v. Mathis,** supra.

In this case, the appellant has acknowledged that the delay was not the fault of the prosecution and the record amply demonstrates only a small delay with no prejudice to the appellant. What delay there was is attributable to the illness of the trial judge, delays inherent in the handling of cases and, to some extent, the failure of the appellant's counsel to go forward at one point.

It is submitted that the record is totally unsupporting of the appellant's contention.

CONCLUSION

The facts of the case make it manifest that there was no constitutional or statutory denial of the appellant's right to a speedy trial. Indeed, every effort was made to expedite the appellant's case with

reasonable dispatch to a final decision. The facts of this case afford no basis for reversal.

This court should affirm.

Respectfully submitted,

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